Supreme Court, U. S.
FILED
JAN 24 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1004

SOUTHEASTERN PROMOTIONS, LTD.,
PETITIONER,

v.

STEVE CONRAD, ET AL.,
RESPONDENT.

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

JOHN ALLEY
Northgate Professional Building
Chattanooga, Tennessee

GERALD A. BERLIN
73 Tremont Street
Boston, Massachusetts

HENRY P. MONAGHAN
10 Post Office Square
Boston, Massachusetts

Blanchard Press, Inc., Boston, Mass. — Law Printers

In the
Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1004

SOUTHEASTERN PROMOTIONS, LTD.,
PETITIONER,

v.

STEVE CONRAD, ET AL.,
RESPONDENT.

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

We deeply regret burdening this Court with a reply brief but respondents have raised the surprising argument that this case is moot (pages 12-13). Nothing in the record supports that contention, and the argument is without foundation. Respondents raised this same argument in the closing paragraph of their brief when the case was before the original panel of the Sixth Circuit. Petitioner thereupon filed an affidavit stating that it fully intended to produce HAIR in Chattanooga. That affidavit went uncontradicted, and accordingly, no judge in the court of appeals made reference to any question of mootness. And in opposing a petition for rehearing *en banc* respondents made no reference to mootness. Now, however, in opposing the petition for certiorari, this bogus issue is raised once again.

Counsel have been in constant touch with petitioner in this case and have been repeatedly informed that, in order to vindicate their constitutional rights, they intend to show HAIR in Chattanooga. We, therefore, are prepared to file yet another affidavit that if successful on this appeal petitioner will present this play.

I.

Since petitioner fully intends to produce HAIR in Chattanooga there is no substance to the contention of mootness. A case is not moot so long as there is a "live controversy" between the parties. *Hall* v. *Beals*, 396 U.S. 45, 48; *Powell* v. *McCormack*, 395 U.S. 486, 495-500, 517-18. That a "live controversy" exists here is, we submit, beyond contradiction. Plaintiff intends to file a new application seeking another date. There is, therefore, a substantial probability that this controversy will recur; indeed, it is apparent beyond any rational doubt that it is certain to do so. It is plain, therefore, that a "live controversy" exists between the parties "If [defendants] were likely to repeat [their] allegedly illegal conduct the case would not be 'moot'." *S.E.C.* v. *Medical Committee for Human Rights*, 404 U.S. 403, 406; see also *Diffenderfer* v. *Central Baptist Church of Miami*, 404 U.S. 412, 417; *Sanks* v. *Georgia*, 401 U.S. 144, 151 (possibility of future injury means that case is not moot).

Carroll v. *The Commissioners of Princess Anne County*, 393 U.S. 175, is particularly instructive here. There a state court had issued a temporary restraining order *ex parte* against a demonstration. On appeal the state court refused

to pass upon the constitutionality of the restraining order on mootness grounds because the order had long since expired. The Court reversed:

> "We agree with petitioners that the case is not moot. Since 1966, petitioners have sought to continue their activities, including the holding of rallies in Princess Anne and Somerset County, and it appears that the decision of the Maryland Court of Appeals continues to play a substantial role in the response of officials to their activities. In these circumstances, our jurisdiction is not at an end.
>
> "This is the teaching of Bus Employees v. Missouri, 374 US 74, (1963), which concerned a labor dispute which led to state seizure of the business. This Court held that, although the seizure had been terminated, the case was not moot because "the labor dispute [which gave rise to the seizure] remains unresolved. There thus exists . . . not merely the speculative possibility of invocation of the [seizure law] in some future labor dispute, bu the presence of an existing unresolved dispute which continues. . . ." Id., at 78.
>
> "In Southern Pacific Terminal Co. v. ICC, 219 US 498, (1911), this Court declined to hold that the case was moot although the two-year cease-and-desist order at issue had expired. It said: 'The questions involved in the orders of the Interstate Commerce Commission are usually continuing . . . and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review' . . ."
>
> "These principles are applicable to the present case.

> The underlying question persists and is agitated by the continuing activities and program of petitioners: whether, by what processes, and to what extent the authorities of the local governments may restrict petitioners in their rallies and public meetings."

See also *Diffenderfer* v. *Central Baptist Church of Miami*, 404 U.S. 412, 417.[30]

Carroll recognizes the important fact that great damage to first amendment rights will result if local officials are permitted to take unconstitutional action and then to insulate themselves from effective appellate review. And its teachings are directly relevant here, for defendants' conduct will be repeated, and accordingly, it will have an impact on the future dealings between the parties. "If [defendants] were likely to repeat [their] allegedly illegal conduct, the case would not be moot." *S.E.C.* v. *Medical Committee for Human Rights*, 404 U.S. 403, 406.

II.

Even if petitioner no longer intended to produce the play, this case would not be moot. There is no doubt that the dispute was a live one when suit was commenced. Even if petitioner no longer sought access to the municipal auditorium, the original denial of permission would fall squarely within the doctrine of "short-term orders, capable of repetition, yet evading review". Numerous recent decisions of this Court indicate that in these circumstances, especially where fundamental interests are at stake, the doctrine of mootness does not operate to bar appellate review. *Brown* v. *Chots*, 411 U.S. 442 at n.5; *Rosario* v. *Rockefeller*, 410 U.S. 752, 756 n.5; and *Roe* v. *Wade*, 410 U.S. 113, 125. The cases are analyzed by one

of counsel in a recent article, *Constitutional Adjudication: The Who and When*, 82 Yale L. J. 1363, 1383-86 (1973). Surely, in any event, the question of whether in these circumstances the case is moot is itself one of far reaching importance, and itself "certworthy". While, happily, that issue need not be resolved in this case, we are prepared to brief and argue the point should the Court so desire.

III.

Finally, if the case were, in fact, moot that provides no basis for denying certiorari. The appropriate course of action would be to grant certiorari, vacate the judgment below, and pass an order that the case be dismissed. *United States* v. *Munsingwear*, 340 U.S. 36, 39.

Respectfully submitted,

JOHN ALLEY
Northgate Professional Building
Chattanooga, Tennessee

GERALD A. BERLIN
73 Tremont Street
Boston, Massachusetts

HENRY P. MONAGHAN
10 Post Office Square
Boston, Massachusetts